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No. 03-250

Supreme Court, U.S.
FILED
OCT 9 - 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

AMERICA WEST HOLDINGS CORPORATION, AMERICA WEST AIRLINES, INC., WILLIAM A. FRANKE, RICHARD R. GOODMANSON, RONALD A. ARAMINI, JOHN R. GAREL, W. DOUGLAS PARKER, MICHAEL R. CARREON, C.A. HOWLETT, STEPHEN F. BOLLENBACH, FRANK B. RYAN AND JOHN F. FRASER,

Petitioners,

v.

EMPLOYER-TEAMSTERS JOINT COUNCIL NO. 84 PENSION TRUST FUND ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. The Ninth Circuit Opinion Conflicts With Other Circuits

As demonstrated in the Petition for Writ of Certiorari ("Petition"), the Ninth Circuit's decision conflicts with the decisions of other Courts of Appeals, most notably the Third and Fifth Circuits. In particular, the Ninth Circuit expressly rejected the Third Circuit's "bright-line" rule "that misrepresentations or omissions are immaterial as a matter of law if the market does not react immediately upon a disclosure of the information." (A24) (citing *Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000)).

Respondents argue that, "upon closer analysis," there is no conflict.[1] (Brief of Respondents in Opposition to Petition for Writ of Certiorari ("Opp.") 17). That is plainly incorrect. In *Oran*, the Third Circuit held that "when a stock is traded in an efficient market, the materiality of disclosed information may be measured post hoc by looking to the movement, in the period *immediately* following disclosure, of the price of the firm's stock." 226 F.3d at 282 (emphasis added). The Third Circuit emphasized that the absence of such movement means the disclosed information was immaterial as a matter of law. *Id.*[2] By contrast,

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[1] As used herein, "respondents" refers to respondent Employer-Teamsters Joint Council No. 84 Pension Trust Fund and other persons who purchased publicly traded Class B common stock of petitioner America West Holdings Corporation ("Holdings") between November 19, 1997 and September 3, 1998.

[2] Similarly, the Fifth Circuit has held that, in fraud-on-the-market cases, a plaintiff must demonstrate "that the complained of misrepresentation or omission have actually affected the market price of the stock. . . ." *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 415 (5th Cir. 2001).

in this case, the Ninth Circuit held that "adoption of a bright-line rule assuming that the stock price will instantly react would fail to address the realities of the market." (A25). The conflict is stark.

Respondents make much ado about alleged declines in Holdings' stock price that occurred in the days after the June 23, 1998 *Wall Street Journal* article (a 4.5% decline) and the July 14, 1998, announcement of the settlement with the FAA (a 5.8% decline). (Opp. 2, 7-8, 14). As an initial matter, stock price declines *days after* the public announcement of the alleged truth about America West are irrelevant, because in an efficient market information is reflected in stock prices "immediately." *See In re Burlington Coat Factory Sec. Litig.*, 14 F.3d 1410, 1425 (3d Cir. 1997); *Semerenko v. Cendant Corp.*, 223 F.3d 165, 181 (3d Cir. 2000); *Binder v. Gillespie*, 184 F.3d 1059, 1065 (9th Cir. 1999). If the efficient market theory is correct, then price movement days after a particular statement cannot be attributed to that statement. Further, respondents' frequent assertions that Holdings' stock price dropped "4.5%" following the *Wall Street Journal* article and "5.8%" following the press release regarding the FAA settlement are highly misleading. Respondents' own memorandum reflects that Holdings' stock price was $28 1/8 before the *Wall Street Journal* article and $28 1/2 *after* the "5.8%" decline nearly a month later. (Opp. 14 n.3). Thus, even after *both* slight declines trumpeted by respondents, Holdings' stock price was still higher after the so-called truth was revealed than it was before the news of the FAA investigation was publicly disclosed. As Judge Tallman recognized, the market reacted with a "collective yawn" to the news. (A51) (Tallman, J., dissenting).

II. Respondents Have Distorted The Ninth Circuit's Decision

As demonstrated in the Petition, the Ninth Circuit's determination that an efficient securities market is subject to "distortions" that prevent the price of publicly-traded stocks from rapidly assimilating and reflecting publicly disclosed information cuts at the heart of the fraud-on-the-market theory adopted in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). Knowing this full well, respondents do not attempt to defend this aspect of the Ninth Circuit's decision. Instead, respondents rewrite the Ninth Circuit's opinion by asserting that it does not refer to market "distortions" in the abstract, but rather to case-specific distortions caused by petitioners' alleged "false reassurances" in response to the disclosure of the information that allegedly had been concealed from the market.[3] The Ninth

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[3] On June 23, 1998, the *Wall Street Journal* reported that the FAA had increased surveillance of America West and that the airline faced substantial federal sanctions for failing to properly oversee the work of outside maintenance contractors. (Opp. 7). The article also stated that in addition to the prospect of sanctions, "the FAA put America West on its 'watch list' June 9 because of labor unrest among maintenance workers and flight attendants. . . . The airline spokeswoman said the enhanced surveillance hasn't turned up any 'significant maintenance or operational problems.'" (A12-A13). Respondents allege that Holdings made certain false reassuring statements including the statement by the company in this article as well as subsequent statements that the enhanced surveillance was "routine FAA procedure" when an airline is involved in labor negotiations and that "no significant maintenance or operating problems had been discovered" as a result of the enhanced surveillance. (Opp. 7-8). Respondents also cite petitioners' post-settlement representation that the settlement would not have "a material adverse effect on the Company's operations or financial results" and that Holdings was "not anticipating any major increase in maintenance costs or cost of the oversights." (Opp. 8).

Circuit's opinion simply is not susceptible to respondents' construction.

The distortions that the Ninth Circuit used as a basis for rejecting "a bright-line rule requiring an immediate market reaction" to the disclosure of allegedly withheld information are unidentified and a mystery. (A25). The relevant passage of the opinion states as follows:

> Pursuant to *Basic*, we reject Defendants' argument for adoption of a bright-line rule requiring an immediate market reaction. The market is subject to *distortions* that prevent the ideal of 'a free and open public market' from occurring. 485 U.S. at 246 (internal quotation marks and citation omitted). As recognized by the Supreme Court, these distortions may not be corrected immediately. *See id.* at 248 n.28. Because of *these distortions*, adoption of a bright-line rule assuming that the stock price will instantly react would fail to address the realities of the market. Thus, we decline to adopt a bright-line rule, and, instead, engage in the 'fact-specific inquiry' set forth in *Basic*.

(A25) (emphasis added and footnote omitted). Contrary to respondents' articulation, the Ninth Circuit did not point to the alleged "false reassurances" as causing any distortion. Rather, the Ninth Circuit incorrectly read *Basic* as acknowledging the existence of inherent market distortions as a *general* matter. Although the Ninth Circuit noted that respondents pointed to petitioners' post-disclosure statements as a reason for delayed market reaction, the decision in no way identifies those statements as causing "distortions that prevent the ideal of a free and open

public market from occurring." (A25) (internal quotation marks and citation omitted).[4]

Notably, the dissenting member of the Ninth Circuit panel, Judge Tallman, did not construe the panel majority's decision in the manner advanced by respondents. As Judge Tallman succinctly asked: "What distortions?" (A57 n.1) (Tallman, J., dissenting). Judge Tallman was "at a loss to understand what evidence the majority employs to discount the non-reaction of the market because the 'market is subject to distortions.'" *Id.* As Judge Tallman observed, respondents "have not alleged any, and in fact have alleged the opposite in order to invoke the fraud-on-the-market theory." *Id.*[5]

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[4] Respondents assert that in *Oran*, the Third Circuit recognized that the making of new false statements contemporaneously with the disclosure of negative information could "distort" the market. (Opp. 17). The Third Circuit, however, merely considered, and rejected, the plaintiff's argument that the defendants' "spin" on the bad news was responsible for the lack of stock reaction. *Oran*, 226 F.3d at 283. Likewise, respondents improperly construe *Nathenson v. Zonagen, Inc.*, 267 F.3d 400 (5th Cir. 2001). In *Nathenson*, the Fifth Circuit recognized that there may be "special circumstances" in which false statements may affect the price of a security even though the price does not change immediately. *Id.* at 419. The circumstance to which the court alluded – the making of a statement that the market expected – is not present in this case.

[5] If respondents' interpretation of the opinion is correct, and the only "distortions" at issue are the so-called reassuring statements, then a showing that those statements were accurate should necessitate a finding that the allegedly undisclosed maintenance issues were immaterial. Put simply, in such a case, the allegedly reassuring statements would not have distorted the stock price. Notably, Judge Tallman (and the district court) found that respondents failed to demonstrate any connection between America West's disappointing operational results in the third quarter of 1998 – the event that precipitated Holdings' stock decline – and the allegedly undisclosed FAA issues and settlement. (A58).

CONCLUSION

Petitioners respectfully request that the Court grant this petition.

Respectfully submitted,

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